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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~[illegible]~~ 43

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT OF PETITION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 652

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

To the Honorable, The Chief Justice of the United States and to The Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Richard J. Brown, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia entered in the above cause (R. 8), October 2, 1948, and numbered and entitled in said Court "Richard J. Brown, Plaintiff-in-Error *v.* Western Railway of Alabama, Defendant-in-Error, Number 32130." Petition for rehearing was denied by said Court on October 22, 1948 (R. 9) and the Supreme Court of Georgia denied the writ of certiorari in said cause (R. 9) on January 12, 1949, at which time the judgment of the said Court of Appeals became final.

I. Jurisdiction

The jurisdiction of this Court is founded on Title 28 United States Code, Section 1257 (3).

II. Statutes Involved

This case arises under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51-59) set forth in the Appendix.

III. Question Presented

The question presented is whether or not the petition filed in the Superior Court of Fulton County, Georgia, set forth a cause of action against the defendant railroad company under the Federal Employers' Liability Act, which was good against general demurrer.

IV. Summary Statement of Matter Involved

Petitioner brought suit under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*) against respondent in the Superior Court, Fulton County, Georgia, a court of competent jurisdiction (45 U. S. C. A., Sec. 56) for injuries sustained by him.

The petition (R. 1) alleged, in substance, that petitioner, in the performance of his duties as a brakeman for respondent around the engine in the switchyards of respondent at Opelika, Alabama, stepped on a large clinker lying beside the tracks, fell and was injured; that respondent "had allowed" clinkers, coal, bottles, tie plates, trash and other debris to accumulate in the yards along the tracks where it was necessary for petitioner to work; that the place was unsafe for use by petitioner; that respondent's negligence directly and proximately caused in whole or in part, petitioner's injuries, and; that the respondent was negligent "(a) In failing to furnish plaintiff with a reasonably safe place in which to work, as herein alleged, (b) In leaving

clinkers, bottles, tie plates, sticks, trash and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen working therein and that petitioner would have to perform his duties with said yards in such condition; (c) In not removing clinkers, bottles, tie plates, sticks, trash and other debris from its yards before assigning the plaintiff to work therein at said time and place as herein alleged." The jurisdictional facts, injuries and damages are pleaded.

Respondent filed a general demurrer to the petition (R. 4) which demurrer was sustained in the Superior Court (R. 4). The Court of Appeals of Georgia affirmed (R. 8), motion therein for rehearing was denied (R. 9), and the Supreme Court of Georgia denied certiorari (R. 9).

V. Reasons for Allowance of Writ

1. This case involves a statute of the United States: The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*) and, more particularly, the sufficiency of a petition to state a cause of action thereunder. In its narrowest aspect it presents the question of whether or not the presence of a large clinker near the tracks in a railroad's yards may constitute negligence to an employee injured thereby. In its broadest aspects it presents the question of the duty of a railroad company to remove known obstacles or hazards alongside tracks which may cause injury to railroad employees. These are questions of gravity and importance under the Federal Act.

2. Furthermore, we shall indicate in our brief that the decision of the Georgia Court in this case is not in accord with applicable decisions of this Court and is in direct conflict with the decisions of Federal Courts and of State Appellate Courts of other jurisdictions. In the interest of

uniformity of application of the Federal Act this Court should grant the writ, as prayed and correct the decision heretofore rendered herein.

In two recent decisions under the Federal Employers' Liability Act this Court has corrected errors of trial courts which were analogous to that which petitioner contends has been made in this case, viz: dismissal on demurrer. *Andersen* v. *A. T. & S. F. R. Co.*, 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 840, and *Lillie* v. *Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 115.

Prayer

WHEREFORE, petitioner prays that this petition be granted, and for such other and further relief in the premises as may be proper and just.

This the 18 day of March, 1949.

THOMAS J. LEWIS,
Attorney for Petitioner.

RICHARD M. MAXWELL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 652

RICHARD J. BROWN,

Petitioner,

vs.

WESTERN RAILWAY OF ALABAMA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. Opinion Below

The opinion of the Court of Appeals of Georgia has not yet been officially reported, but is set forth in 49 S. E. (2d) 833 and in the Record, page 5 *et seq.*

II. Jurisdiction of Court

The jurisdiction of this Court is founded on Title 28 United States Code, Section 1257(3), a right being specially set up and claimed under a statute of the United States, namely, the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*).

The date on which the judgment sought to be reviewed became final was January 12, 1949 (R. 9).

III. Statement of the Case

To the petition herein the defendant filed a general demurrer which was sustained in the Superior Court of Fulton County, Georgia. The Court of Appeals of Georgia affirmed on October 2, 1948 and denied the motion for rehearing on October 22, 1948. Certiorari was denied by the Supreme Court of Georgia on January 12, 1949.

Brown sued the Western Railway of Alabama under the Federal Employers' Liability Act for personal injuries sustained when he, in the performance of his duties as a brakeman, ran around the engine during a switching movement in the railroad yards at Opelika, Alabama, stepped on a large clinker lying beside the tracks, fell and was injured.

We adopt the analysis of the petition by the Court of Appeals of Georgia:

> "Defendant railroad is a corporation having an office, agent, and place of doing business in Fulton County, and has injured and damaged petitioner in the sum of $5,000.00. Petitioner was employed on or about August 25, 1947 by the Atlanta and West Point Rail Road Company as a brakeman on freight train No. 1, running from Atlanta to West Point, and by the Western Railway of Alabama, the defendant, on this same train while it was running from West Point, Georgia, through Opelika, Alabama, to Montgomery, Alabama. 'Petitioner while engaged in the employment aforesaid was injured as a result of the negligence of defendant when he slipped and fell on a large clinker lying beside the track in the switch yards of Opelika, Alabama, over which it was necessary for petitioner to cross in giving signals to his engineer . . . The yards aforesaid are jointly operated by the defendant and the Trustees of the Central of Georgia Railway Company . . . Defendant had allowed clinkers, coal, bottles, tie plates, trash and other debris to collect in said yards along the side of the tracks and . . . it was necessary for petitioner, in the performance of his duties, to cross

over such material and debris . . . It was the duty of defendant to use reasonable and proper care to provide him a reasonably safe place in which to work in the course of his duties and employment . . . The defendant did not regard its duty in this behalf to use reasonable and proper care to provide plaintiff a reasonably safe place in which to discharge his duties as aforesaid, but directed him to work in said yards at said time under the conditions above described . . . The debris aforesaid scattered along beside the tracks and over said yards at said time made (the) yards unsafe for use by petitioner in the performance of his duties and . . . defendant thereby negligently failed to furnish petitioner a reasonably safe place in which to work by reason thereof . . . Petitioner while switching cars in the yards aforesaid, ran around the engine, as his duties at said time required, to mount the top of cars being handled so that he could see the back end of the cut of cars and the engineer at the same time and give the necessary signals for the switching movement there being made, and while in the performance of such duties as aforesaid he stepped on a large clinker lying beside the tracks as aforesaid which caused petitioner to fall and be injured in the particulars hereinafter set out.' The petition contains a description of plaintiff's injuries and shows that a bone of his right foot was broken, which did not at first heal properly, with resulting pain and the loss of time from work. It is alleged that $1,304.01 was lost in wages because of his inability to work as a result of the injuries. Negligence is charged to the defendant in the following particulars: '(a) In failing to furnish plaintiff with a reasonably safe place in which to work as herein alleged. (b) In leaving clinkers, bottles, tie plates, sticks, trash and other debris along the side of track in its yard as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen working therein and that petitioner would have to perform his duties with said yards in such condition. (c) In not removing clinkers, bottles, tie plates, sticks, trash and

other debris from its yards before assigning plaintiff to work therein at said time and place as herein alleged.' The petitioner shows that plaintiff and defendant were engaged in Interstate Commerce at the time of the accident."

IV. Specification of Errors

We submit that the Court of Appeals of Georgia was in error:

(a) In affirming the judgment of the Superior Court sustaining the general demurrer.

(b) In holding that the petition does not set out a cause of action under the Federal Employers' Liability Act.

(c) In holding that the petition did not show negligence on the part of the defendant.

(d) In holding that applicant was negligent.

(e) In holding that applicant's negligence was the sole cause of his injuries.

(f) In holding as follows:

> "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence. Furthermore, it is not shown how or for what length of time the clinker was in the yard, or wherein it rendered the yards unsafe for employees accustomed to work there. Insofar as the allegations of the petition show, the sole cause of the accident was the act of the plaintiff in stepping on this large clinker, which he was able to see and could have avoided. It was he, who, without any outside intervention, failed to look, stepped on the clinker, and fell. Under such circumstances there is no question of negligence on the part of the defendant to present to a jury, and the trial court did not err in sustaining the general demurrer and in dismissing the action", this holding being in conflict with the allegations of the petition and the law applicable.

(g) In failing to apply the Federal Law to a case involving a Federal question in an action under a Fed-

eral statute, viz: The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*).

V. Argument

The single question here presented is whether or not petitioner's complaint (R. 1) set forth a cause of action good against general demurrer. The Georgia Courts, with complete unanimity, have held that it did not. We earnestly believe that it did.

A. *The Georgia Decisions Discussed*

The core of the opinion of the Court of Appeals of Georgia—the only written opinion of any Court in this case thus far—is found in these words:

> "The mere presence of a large clinker in a railroad yard cannot be said to constitute an act of negligence."

Assiduous research has brought to light no reported decision in accordance with this expression of law, with one possible exception, that of *Lee* v. *Cent. R. Co.*, 86 Ga. 231 12 S. E. 307 (1890) which was decided prior to the Federal Employers' Liability Act, and in which the court said:

> "The plaintiff's injury was simply a misfortune, the incident of his employment and of the risk consequent thereon."

In a subsequent decision handed down at the same Term, Mr. Chief Justice Bleckly who wrote the decision in the *Lee* case, *supra*, said that it was based upon the doctrine of assumption of risk. *E. Tenn. Ry. Co.* v. *Suddeth*, 86 Ga. 388 at 391 (1890). And Mr. Justice Atkinson so construed the *Lee* case, *supra*, in his dissenting opinion in *Seaboard A. L. Ry.* v. *Bishop*, 132 Ga. 71 at 93 (1909). The 1939 amendment to the Federal Employers' Liability Act (45 U. S. C. A., Sec. 54) abolished the doctrine of assumption of risk in

such cases. *Tiller* v. *A. C. L. R. Co.*, 318 U. S. 54, 63 S. Ct. 444; 87 L. Ed. 610.

The *Lee* case is distinguishable from the case at bar on its facts: Lee stepped from a moving train onto the clinker whereas Brown stepped on the clinker when he "ran around the engine as his duties at said time required" (Pet. par. 10, R. 2); the opinion in the *Lee* case, *supra*, does not indicate that the clinker was in the *railroad yards*, whereas the petition so alleges in Brown's case; there was no showing that the surrounding terrain was unsafe generally for Lee, whereas Brown alleges that the railroad company "had allowed clinkers, coal, bottles, tie plates, trash and other debris to collect in said yards along the side of the tracks and that it was necessary for petitioner, in the performance of his duties, to cross over all such material and debris." (Pet. par. 6, R. 1-2.)

There is an indication in the language used in the opinion in the *Lee* case, *supra*, that these variants are controlling as to result (86 Ga. At P. 233):

> "There is no suggestion that the condition of the track or the neighboring surface was unsafe, save in that one spot, and there is no suggestion that the plaintiff's duty required him to step off at that spot rather than any other."

The Court of Appeals of Georgia in *So. Ry. Co.* v. *Puckett*, 16 Ga. App. 551, 86 S. E. 809, held that the presence of three large clinkers near a track in a railroad yard made a question of negligence for the jury, and this Court affirmed, *So. Ry. Co.* v. *Puckett*, 244 U. S. 571; 37 S. Ct. 703; 61 L. Ed. 1321, saying:

> "It is contended that there is no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty, was called upon to pass.

This is no more than a question of fact, without exceptional features. . . ."

Cent. of Ga. Ry. Co. v. *Goens*, 30 Ga. App. 770; 119 S. E. 669 (1923) held good on general demurrer a petition alleging that the employee's death was a result of defendant's negligence when he struck his foot against an arch-brick eight inches square and five inches thick and also stumbled over a large accumulation of clinkers while, in the course of duty as a switchman, he was walking beside a moving train in railroad yards at night. Goen's vision was obscured by darkness; Brown's vision was obscured by the engine, around which he ran.

The other Georgia decision, somewhat comparable to Brown's case, is *Gay* v. *Osteen*, 56 Ga. App. 224, 192 S. E. 539 but it was decided under the Georgia Employers' Liability Act on assumption of risk and failure to prove knowledge or notice of the railroad company that the brake-shoe, on which plaintiff stepped, was lying beside the tracks. Knowledge of defendant is specifically set forth in Brown's petition (Pet. par. 17-b, R. 3), hence is not pertinent here.

These Georgia decisions are cited as examples of the somewhat vacillating manner in which the Georgia Courts have looked upon cases of this nature over the years. Each is distinguishable from the case here presented, as we have endeavored to show.

However, the Georgia cases are not controlling.

B. *The Federal Decisions Govern*

This action was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.* See Appendix), as the Court of Appeals of Georgia recognized in the initial phase of its opinion.

The rights created by that Act are Federal rights protected by Federal rather than by local rules of law, and

this is true in suits charging negligence of the carrier in failing to furnish the employee a reasonably safe place to work. "That rule is deeply engrained in Federal jurisprudence." *Bailey* v. *Cent. Vt. Ry.*, 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444. It is requisite, therefore, that we look to the Federal decisions.

C. The Federal Decisions Discussed

Cin., N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1, (6th Cir. 1916) was a case in which a brakeman, in dismounting from cars moving six or eight miles per hour in railroad yards, stepped on a "loose piece of furnace slag" the size of a cocoanut, was thrown beneath the cars and was injured. At P. 3 the Court said:

> "The negligence complained of was permitting that piece of slag to be there."

The opinion deals almost entirely with the question of assumption of risk and contributory negligence, but the verdict and judgment below for plaintiff was affirmed.

Cin., N. O. & T. R. Ry. Co. v. *Davis*, 293 F. 481 (6th C. C. A.) held the railroad liable for injuries to a brakeman who tripped over a cross-tie while running to throw a switch. Negligence charged was in "throwing and distributing crossties promiscuously along the track and in such near proximity thereto as to menace the safety of plaintiff in the discharge of his duties." The court said, P. 483:

> "However that may be, it was the duty of the railway company to exercise reasonable care to provide its employees a safe place in which to work, consistent with the nature of the employment. The company knew that in the operation of its railroad it would become necessary, from time to time, for brakemen to alight from the train and run ahead of it to throw switches . . . it was a question for the jury to determine whether the

throwing of the ties promiscuously along its tracks and so near thereto as to endanger the lives of its employees in the performance of their duties, was negligence, or evidenced negligence, or evidenced a negligent disregard of and failure to perform its duty to exercise reasonable care to furnish its employees a safe place to work."

B. & O. R. Co. v. *Kast*, 299 F. 419 (6th Cir. 1924) cert. den. 266 U. S. 613, affirmed a judgment below for plaintiff, a machinist's helper who had sued for injuries sustained when he stepped on a socket-wrench lying in the pathway in the defendant's yards The Court held that the question of defendant's negligence was proper for submission to the jury. (Headnote 3.)

In *B. & O. R. Co.* v. *Flechtner*, 300 F. 318, (6th Cir. 1924), cert. den. 266 U. S. 613, 45 S. Ct. 95, 69 L. Ed. plaintiff was injured while working as a brakeman in defendant's yards when he stepped on a hoop alongside the tracks. The court, affirming the judgment below for the plaintiff said, p. 320:

> "In one respect at least the facts here are stronger than in the Kast case. The rusty condition of the hoop justified a submission to the jury of the question whether or not defendant had actual notice or in the exercise of due care should have known in sufficient time to remove it, that the hoop was improperly there, *and whether or not, because of its presence, the place was reasonably safe for its employees.*"

In *Virginian Ry. Co. v. Staton*, 81 F. (2d) 133 (4th Cir. 1936), the railroad was held liable for injuries received by a brakeman when his breeches-leg caught on a spike protruding 2½ inches to 4 inches. The court, by Judge Soper, said that it was not necessary to decide whether or not the Federal Employers' Liability Act applied to the facts because plaintiff could recover "even if the harsher rules of the common law of negligence are applied." (P. 134.)

Then, after discussion of the contention of the railroad that the presence of protruding spikes did not indicate a lack of due care on its part, the court said, p. 135:

> "On the other hand, the evidence in the pending case shows that the railway company was well aware that constant supervision was required in order to keep its roadbed in good condition for it caused its tracks in the railroad yard, where the accident occurred, to be inspected by a track-walker twice a week, and by a foreman once a week so that protruding spikes might be hammered back into place. It is admitted that ordinary spikes work up gradually and the plaintiff testified that it would take a spike three months to work up to a height of four inches above the tie. We think, therefore, that the jury might reasonably have inferred that the duty of inspection had been carelessly performed, for otherwise spikes protruding according to various estimates from 2½ to 4 inches would have been discovered and put back in place.
>
> ". . . It was, therefore, proper in the pending case for the District Judge to submit the question to the jury whether the defendant railway company had performed the duty of exercising reasonable care to furnish to the plaintiff a reasonably safe place to work, and the motion of the defendant for a directed verdict in its favor was rightly refused."

C. B. & O. R. Co. v. *Kelley*, 74 F. (2d) 80 (8th Cir. 1934) dealt with the death of a brakeman who was killed during a switching movement when thrown from a car and run over in making a flying switch. Negligence alleged was in the railroad allowing weeds to grow up above the top of the rails, causing the wheels to skid when the brakes were applied. The court said, p. 83:

> "Whether or not permitting weeds to accumulate on the tracks to such an extent as to come between the wheels of the engine and the top of the rails, and thus causing the powerful and heavy locomotive to slide,

was negligence under the facts and circumstances of this case, was a jury question."

In the recent decision of *Chi. & N. W. Ry. Co.* v. *Peeler*, 140 F. (2d) 865 (8th Cir. 1944), the question was whether a protruding crossing plank over which the plaintiff switchman stumbled constituted negligence and the court answered, saying,

> "Upon this evidence the jury was warranted in finding that the protruding end of the plank was a defect in appellant's 'works,' that such defect was due to appellant's negligence and that Peeler's injuries resulted from such negligence. Compare *Thomason v. Boles*, 123 F. (2d) 487, cert. den. 315 U. S. 804, *McCarthy v. Palmer*, 113 P. (2d) 721, *Lock v. C. B. & O. R. Co.*, 219 S. W. 719."

Henwood v. *Cheney*, 156 F. (2d) 392 (8th Cir. 1946), was an action for injuries to plaintiff switchman when he slipped on oil and mud as he ran beside moving cars trying to pull a coupling pin. The oil came from engines and tank cars which leaked. Negligence charged was failure of the railroad to furnish plaintiff a reasonably safe place to work. (p. 394). Judgment below for plaintiff was affirmed. See, also *Fleming* v. *Kellett*, 167 F. (2d) 265.

D. *State Court Decisions Other Than Georgia*

One of the bases for requesting this Court to grant certiorari in this case is the conflict between the Georgia decisions herein and the decisions of both Federal and State Courts of other jurisdictions. The strong urge of uniformity of application of Federal law throughout the judicial system which administers such law has long been recognized by this Court. Consequently, we turn now to the decisions of State Courts other than Georgia.

Without burdening this Court with a detailed analysis of those cases we point to the following, which, we submit, are

in conflict with the opinion of the Georgia Court in the case at bar, showing as they do that such courts held that obstacles or hazards alongside tracks where employees must work constitute negligence on the part of the carrier and, hence, support our position here:

Doyle v. *S.V.L. etc. Ry. Co.*, 31 S.W. (2d) 1010 (wire embedded in footpath along track); *Haskins* v. *So. Pac. Co.*, 39 P. (2d) 895 (umbrella plant); *Smith* v. *Schumacher*, 85 P. (2d) 967 (embedded angle bar); *Green* v. *A.C.L. R. Co.*, 134 S. E. 385 (limb of a tree); *So. Ry. Co.* v. *Newton's Admr.*, 60 S. E. 625 (trench); *El Paso, etc., Ry. Co.* v. *Alexander*, 117 S. W. 927 (lumps of coke); *St. L., etc., Ry. Co.* v. *Ford*, 121 S. W. 709 (space between ties); *Holloway* v. *M. K. & T. Ry. Co.*, 208 S. W. 27 (insecure ballast); *Burks* v. *A. T. & S. F. Ry. Co.*, 109 P. 1087 (lump of coal); *Adskim* v. *Wash. Ry. & NW Co.*, 276 P. 1094 and 294 P. 605 (pile of cinders and gravel); *Hicks* v. *Mo. Pac. R. Co.*, 40 S. W. (2d) 512 brake-shoe); *Gillispie* v. *Grand Trunk Ry. Co.*, 113 N. W. 1116 (pile of gravel).

No doubt the authorities might be multiplied.

E. *Petitioner Entitled to Jury Trial*

> "To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

said this Court in *Bailey* v. *Cent. Vt. Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, a safe-place-to-work case. See, also, *Tiller* v. *A.C.L. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 32, 64 S. Ct. 409, 88 L. Ed. 520; *Lavendar* v. *Kurn*, 327 U. S. 653, 66 S. Ct. 740, 90 L. Ed. 421; *Ellis* v. *U.P. R. Co.*, 329 U. S. 649; 67 S. Ct. 598, 91 L. Ed. 576; *Jesionowski* v. *B. & M. R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416.

At the outset of his case Brown has been met with a decision sustaining a general demurrer. Although the Federal decisions cited *supra*, p. 12), leave little doubt that the pleaded facts sufficiently and properly allege negligence on the part of the railroad company, we submit that, at the very least, the question of whether or not the defendant was negligent in knowingly leaving a large clinker alongside its tracks in its yards where employees would have to work is a jury question. To paraphrase the language of the *Bailey* case, *supra:* all facts and circumstances are for the jury to weigh and appraise in determining whether respondent in furnishing Brown with that particular place in which to perform the task, was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury. . . . Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.

This is not the case of a man stepping to the ground from a moving engine, as was the *Lee* case, *supra.* Rather, it is one in which plaintiff ran around a moving engine in railroad yards, as his duties required, in which circumstances he was required to look out for moving cars, give and receive signals, etc. These are factors relating to contributory negligence and should not properly be considered on demurrer. They are mentioned here only because the opinion of the Court of Appeals of Georgia states that petitioner "was able to see and could have avoided" the clinker, a dictum which disregards both the realities of the situation and the language of this Court in *Bailey* v. *Cent. Vt. Ry. Co., supra:*

> "The duty of the employer becomes 'more imperative' as the risk increases. *Patton* v. *T. & P. Ry. Co.,*

179 U. S. 658, 21 S. Ct. 275, 277, 45 L. Ed. 361, and cases cited."

In *Wilkerson* v. *McCarthy, et al., Trustees of the Denver, R. G. & W. R. Co.*, No. 53, Oct. Term, 1948, — U. S. —, — S. Ct. —, — L. Ed. —, decided January 31, 1949 (17 L. W. 4175) this Court, in considering a Federal Employers' Liability Act case, said:

> "But the issue of negligence is one for juries to determine according to their findings of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business'. *Tiller v. A. C. L. R. C.*, 318 U. S. 54, 67."

Certainly in the light of this expression petitioner should have been permitted to offer proof on the issue of negligence and, assuming its sufficiency, the Court should have placed before the jury the question of whether a reasonable and prudent person would permit a large clinker to be alongside a track in railroad yards where employees must work in performing their duties.

F. *Conclusion*

In a dissenting opinion in the recent decisions of *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1097, — L. Ed. —, Mr. Justice Frankfurter (Mr. Justice Murphy concurring), quoted Mr. Justice Holmes in *Haddock* v. *Haddock*, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1:

> "I do not suppose that civilization will come to an end whichever way this case is decided."

Nor do we believe that this Court's disposition of this case will rock the Republic on its foundations. However, we do earnestly believe that the decision in this case will be one of great importance under the Federal Employers' Liability Act since it deals with the duty of hundreds of carriers to keep reasonably safe for hundreds of thousands of employees the premises whereon they must work, the import of the term "reasonably safe", its application to the somewhat-common facts presented here, and whether or not, in the final analysis, the determination of the question of ordinary care is the province of a jury acting under proper instructions.

We have brought to the attention of this Court the numerous decisions, Federal and State, with which the decision of the Court of Appeals of Georgia clashes, and we ask this Court to say that the impact of these authorities obliterates the decision of that Court in *Brown* v. *Western Railway of Alabama* from the books.

In *Anderson* v. *A. T. & S. F. Ry. Co.*, 333 U. S. 821, 68 S. Ct. 854, 92 L. Ed. 840, this Court reached out to an erroneous decision in the trial court of California in the nature of general demurrer (Footnote No. 1), granted certiorari, reversed and remanded. See, also, comparable decision as to a Federal District Court in *Lillie* v. *Thompson*, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 115.

We respectfully submit that certiorari should be granted, the decision of the Court of Appeals of Georgia reversed and the case remanded.

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APPENDIX

The relevant parts of the Federal Employers' Liability Act (45 U.S.C.A., Sec. 51, et seq.) deemed to have an important bearing on the case read, in part, as follows:

"Section 51. Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Section 53. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, . . ."

"Section 54. In any action brought against any common carrier or by virtue of the provisions of this chapter to recover damages for injuries to, . . ., any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . ."